Supreme Court, U.S.
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No. 85-424

In the Supreme Court of the United States

OCTOBER TERM, 1985

JONATHAN D. MEAD, A MINOR BY WILKIN MEAD, JR., HIS FATHER AND NEXT FRIEND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the district court committed reversible error by sustaining an objection to an expert witness's repetition, during a bench trial, of testimony contained in the witness's previously admitted deposition.

1. On August 24, 1978, the Scott Air Force Base treated several military housing units with the insecticide "chlordane" to control termites (Pet. App. 10). Shortly thereafter, petitioner's family moved into one of the housing units. In January 1979, petitioner experienced a seizure that resulted in permanent brain damage (*id.* at 14).

Petitioner brought an action in the United States District Court for the Southern District of Illinois under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.* He alleged that the government negligently applied the insecticide and

that his resulting exposure to chlordane caused his disability (Pet. App. 1-2). Prior to trial, the parties agreed that a deposition of petitioner's expert witness, Dr. John Davies, would be admitted into evidence in lieu of his live testimony (*id.* at 3-4). The deposition was introduced and admitted at the commencement of the bench trial (*id.* at 4). Later, following presentation of petitioner's case, petitioner called Dr. Davies as a rebuttal witness (*ibid.*). The government objected to petitioner's elicitation of testimony already contained in Dr. Davies' deposition on the ground that the testimony was cumulative (*ibid.*). The court sustained the government's objection (*ibid.*). At the trial's conclusion, after considering all of the medical evidence, the district court held that post-infectious encephalopathy, rather than chlordane exposure, was the most probable cause of petitioner's disability (*id.* at 5).

The court of appeals affirmed in an unpublished order (Pet. App. 1-6). The court held that the trial judge did not abuse his discretion in limiting Dr. Davies' testimony and that petitioner could not have been prejudiced by exclusion of repetitious testimony (*id.* at 5).

2. The unpublished decision of the court of appeals is correct, does not conflict with decisions of this Court or other appellate courts, and presents no issues warranting this Court's review.

a. A district court has broad discretion in determining whether to admit or exclude expert testimony. As this Court has explained:

> Petitioners have very much the laboring oar in showing that such rulings constitute reversible error, since "in judicial trials, the whole tendency is to leave rulings as to the illuminating relevance of testimony largely to the discretion of the trial court that hears the evidence."

Hamling v. *United States*, 418 U.S. 87, 124-125 (1974) (quoting *NLRB* v. *Donnelly Garment Co.*, 330 U.S. 219, 236 (1947)). See also, *e.g.*, *Salem* v. *United States Lines Co.*, 370 U.S. 31, 35 (1962); *Michelson* v. *United States*, 335 U.S. 469, 480 (1948). "The District Court retains considerable latitude even with admittedly relevant evidence in rejecting that which is cumulative * * *." *Hamling*, 418 U.S. at 127. See Fed. R. Evid. 403. That authority is particularly broad when — as in this case — the district judge himself sits as the trier of fact.

Dr. Davies' deposition was submitted to the court prior to trial and was properly admitted into evidence (Pet. App. 3-4).[1] The district judge read it and carefully considered its contents (Pet. App. 19-23). Thus, the judge was well situated to determine whether Dr. Davies' subsequent live testimony, offered for rebuttal purposes, would be unnecessarily repetitive. The judge's ruling, only excluding testimony already set forth in the deposition, did not deny petitioner his opportunity to present proper rebuttal evidence. The judge acted well within the bounds of his discretion by excluding the cumulative testimony.

Petitioner mistakenly contends (Pet. 14-22) that the district court's ruling conflicts with *Frechette* v. *Welch*, 621 F.2d 11 (1st Cir. 1980), *Salsman* v. *Witt*, 466 F.2d 76 (10th Cir. 1972), and *Arnstein* v. *Porter*, 154 F.2d 464 (2d Cir. 1946). In *Frechette*, the First Circuit ruled that the district court erred, albeit harmlessly, in permitting use of a deposition at trial without satisfying the Fed. R. Civ. P. 32(a)(3)

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[1]The record does not reveal the precise basis for admission of the deposition. Most likely, it was admitted on the basis that Dr. Davies, a Florida resident (see Pet. 7), was more than 100 miles from the place of trial. Fed. R. Civ. P. 32(a)(3)(B). However, it might also have been admitted on the court's determination that "such exceptional circumstances exist as to make it desirable * * * to allow the deposition to be used." Fed. R. Civ. P. 32(a)(3)(E). In all events, both petitioner and the government agreed to its admission.

criteria. 621 F.2d at 13-14. The deposition had been admitted without the agreement and over the objection of the opposing party. See *ibid.* Here, by contrast, *petitioner* himself introduced the deposition into evidence. In *Salsman*, the Tenth Circuit held that the district court erred in using depositions that had not been offered and admitted into evidence (see 466 F.2d at 77), a ruling that is facially inapplicable to the present case. In *Arnstein*, the Second Circuit held that the district court improperly entered summary judgment, over the plaintiff's objections, in the face of conflicting deposition testimony. 154 F.2d at 470. The court of appeals' discussion of the preference for live testimony, appearing in the context of summary judgment, is inapplicable to the present situation, which involved a bench trial on the merits in which petitioner himself chose to submit the deposition in lieu of live testimony.[2]

b. Even if the district court erred in excluding Dr. Davies' live testimony, the error would be harmless. See *Frechette* v. *Welch*, 621 F.2d at 13. A judge's exclusion of repetitive testimony in a bench trial plainly cannot prejudice any substantial right and, therefore, provides no ground for disturbing the judgment. See 28 U.S.C. 2111; Fed. R. Civ. P. 61.

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[2]Petitioner denies agreeing to the use of the deposition in lieu of live testimony. However, the court of appeals, upon examination of the record, specifically found otherwise (Pet. App. 3-4, 5-6). That factual determination does not warrant consideration by this Court. In any event, the agreement is not critical to the exclusion of Dr. Davies' testimony. It is sufficient that Dr. Davies' deposition was admitted into evidence and that his live testimony would have been cumulative. See Fed. R. Evid. 403.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Acting Solicitor General

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